

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

AARON ROGERS,

Defendant-Appellant.

UNPUBLISHED

May 8, 2003

No. 234050

Wayne Circuit Court

LC No. 00-010795-01

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's convictions arise out of his armed robbery of a young mother after he forced his way into her car.

Defendant first argues that the trial court erred when it allowed his "other acts" into evidence. MRE 404(b). We agree. This Court reviews a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Rule 404(b) states, "Evidence of other crimes . . . is not admissible to prove the character of a person It may, however, be admissible for other purposes, such as proof of . . . identity" MRE 404(b). When a prosecutor offers other acts evidence to prove a defendant's identity through a similar system,

(1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or . . . system in doing the act . . . ; (3) one or more of these factors must be material to the defendant's guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice. [*People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982)].

Here, the prosecutor introduced testimony about defendant's earlier attempt to rob another woman in Lansing two years before the instant crime. The prosecutor satisfied the first

prong of the *Golochowicz* test because defendant pleaded guilty to attempted larceny for his conduct in Lansing. The prosecutor failed to satisfy the second prong, however, because the two incidents do not share any special circumstances that would indicate the same culprit committed both offenses. *Smith, supra* at 678-679.

This Court will only reverse a trial court's erroneous admission of 404(b) evidence, however, if it appears "that it is more probable than not that the error was outcome determinative." *Id.* In the case at bar, complainant and her cousin saw defendant's unmasked and distinct face in the daytime at close range. Before defendant's arrest, the complainant independently identified him in a store, and then again on the street. She knew defendant's face so well that rather than identify his brother in a line-up, she instead commented on the facial similarities between them. Finally, defendant's cousin testified that defendant left the complainant's stolen checkbook at his house. Because there was overwhelming evidence of defendant's guilt, the erroneous admission of the evidence was not outcome determinative.

Defendant next argues that the trial court erred when it instructed the jury regarding flight evidence. We disagree. This Court reviews a trial court's jury instructions for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

The complainant and her cousin testified that defendant ran from the scene after the robbery. Evidence that a defendant ran from a crime scene is admissible to show that a defendant understands the wrong committed. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Therefore, the facts and law supported the trial court's instruction.

Defendant next argues that the trial court should have supplemented its eyewitness jury instruction in favor of defendant. We disagree. This Court entertained an identical argument in *People v Young*, 146 Mich App 337, 338-339; 379 NW2d 491 (1985). There, this Court held that the legal accuracy of the standard jury instruction, CJI2d 7.8, rendered unnecessary any supplementation in a defendant's favor. *Id.* at 339. Therefore, the trial court did not abuse its discretion when it gave the jury the standard instruction.

Defendant next argues that the trial court plainly erred when it failed to sua sponte caution the jury about defendant's cousin's testimony. We disagree. Defendant did not raise this issue below. When a criminal defendant asserts unpreserved, nonconstitutional error, this Court will not reverse absent plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court is only required to instruct the jury based on the facts presented. *Ho, supra*, at 189. Here, neither the prosecution nor the defense admitted evidence that defendant's cousin was an accomplice, so the facts did not give rise to the issue. *Id.*

Defendant next argues that the prosecutor improperly vouched for a witness' credibility during closing argument. Defendant did not object to the prosecutor's statements below. Therefore, we review the issue for plain error that affected substantial rights. *Carines, supra* at 763.

The law prohibits a prosecutor from vouching for a prosecution witness' veracity. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). During closing arguments, the

prosecutor stated that the witness “tells it like it is,” and referred to her testimony as “truthful.” While these statements qualify as impermissible vouching, they do not require reversal. *Id.* at 382. In *Knapp, supra*, the prosecutor told the jury, “you have the word of [the prosecution’s witness]. You have his honest, painful, straightforward testimony about what this man made him do—and that is enough.” *Id.* In that case, as with here, the defendant failed to object to the improper statements and this Court held that because an instruction would have “removed any taint the prosecutor’s brief comment may have caused,” and the trial court had instructed the jury that the attorneys’ arguments were not evidence, the statement did not warrant reversal. *Id.* at 382-383. We conclude that there was overwhelming untainted evidence in this case such that any error here did not result in manifest injustice. *Carines, supra* at 763. Therefore, the prosecutor’s impermissible statement did not require reversal.

Defendant also argues that the prosecution insinuated to the jury that additional incriminating facts existed that were not admitted into evidence. While such conduct would be improper, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), we find no factual support for this argument.

Finally, defendant argues that the cumulative effect of these errors deprived him of a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). When deciding this issue, we consider only errors actually committed by the court and unfair prejudice injected by the prosecutor. *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002).

In the case at bar, the trial court harmlessly erred in admitting the other acts testimony, and the prosecutor improperly vouched for one witness’ credibility. The prosecutor’s brief comments did not draw an objection, even though any objectionable statement could have been cured with an instruction. Because there was insufficient cumulative error, defendant was not deprived of a fair trial. *Id.*

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper